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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the respondent in the above captioned matter and supporting affirmance of the decision of the Supreme Court of Wisconsin. Written consents and the petitioner and respondent have been obtained and filed with the Clerk of Court.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. The Committee on State Taxation (COST), an advisory committee of the Council, consists of 365 corporate members. COST member companies conduct a substantial portion of the interstate commerce of United States taxpayers and are representative of that part of the nation's business sector which is directly affected by state taxation of interstate operations.

This case involves the interpretation of a federal statute limiting a state's ability to impose an income tax on sellers of tangible property. In practical application, the statute affects not only a state's right to impose a tax, but also the amount of income that may be subject to tax. Clearly, as corporations engaged in interstate commerce, COST member companies have a great interest in promoting the enforcement of a federal law protecting interstate commerce from unreasonable state taxation.

SUMMARY OF ARGUMENT

The sole issue in this case is the interpretation of a federal statute, 15 U.S.C. § 381 (hereinafter referred to as P.L. 86-272), which protects a business from the imposition of state tax where the only business activity within that state is the "solicitation of orders". The specific issue presented in this case is the meaning of the term "solicitation" as used in this federal statute. The term solicitation has been a "primary area of ambiguity in the statute" leaving unclear "the question of what kinds of activity may be considered an integral part of the process of solicitation". Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, Pursuant to Public Law 86-272, as amended. (hereinafter referred to as the Willis Report), at 144.

Congress determined that a nonresident business should be permitted to engage in certain minimum activities within a state without being required to file income tax returns even if the business has nexus, in the constitutional sense, with that state for tax purposes. Therefore, Congress enacted P.L. 86-272. If this legislative intent is to be effectuated, the term "solicitation" must be given a realistic interpretation. The narrow interpretation supported by a number of states, under which a person can do no more than the act of writing an order, renders P.L. 86-272 a nullity. The "middle ground" approach—the "pre-sale/post-sale" test-advocated by other states filing as *amici* in this case, fails to meet the intent of the federal law. The pre-sale/post-sale test is an unworkable test that ignores the reality of doing business in the United States.

Sales take place on a continuum. An activity that is "post" one sale is always "pre" the next sale. Thus, in order for P.L. 86-272 to have the effect intended by Congress and give business entities the necessary protection, the term "solicitation" must be interpreted to include all activities that are taken to encourage the placing of additional orders.

ARGUMENT

THE TERM "SOLICITATION" AS USED BY CONGRESS IN P.L. 86-272 MUST BE INTERPRETED IN A MANNER THAT WILL EFFECTUATE LEGISLATIVE INTENT

The issue before this Court is the interpretation of the term "solicitation" as used by Congress in P.L. 86-272.[1] The issue is simply one of interpretation of a federal law that provides that nonresidents should be allowed to engage in certain minimum activities within a state without being subjected to income taxation by that state.[2]

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[1] P.L. 86-171 provides, in relevant part:

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State, by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, or orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

[2] Due process notions of "nexus" minimal contacts as argued in Section B of Petitioner's Brief are simply irrelevant to the present issue and must be seen as no more than an attempt to confuse the issue before this Court in the instant case. As Petitioner noted, Respondent admitted in its Brief in Opposition that such minimum contacts exist to allow the state to impose its income tax. However, this case involves transactions which are protected by a federal law, passed under Congress' authority to regulate interstate commerce. Thus, the only issue in this case is the interpretation and application of that federal law.

It is necessary to understand the problem that Congress was seeking to alleviate by enacting P.L. 86-272 in order to understand the activities permitted by P.L. 86-272 to take place within a state without subjecting a nonresident to taxation by the state. The legislative history of the Act shows that it was enacted as a result of concern expressed by the business community arising out of this Court's decision in *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959) and this Court's decision not to review *Brown-Forman Distillers Corporation v. Collector of Revenue*, 234 La. 651, 101 So.2d (1958), *cert. denied*, 359 U.S. 28 (1959) and *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959). S. Rep. No. 658, 86th Cong., reprinted in 1959 U.S. Code Cong. & Admin News, 2548 et seq. This apprehension was due in large part to the compliance burden entailed in determining income apportionable to a large number of states with inconsistent and varying tax laws. *Id.* at 2529.

> "Public Law 86-272 was enacted to . . . to establish minimum standards for the imposition of income taxes. . . . [t]he statute does alter the result in cases like *Brown-Forman* and *International Shoe* to the extent that they are authority for taxing a corporation which maintains no in-State sales office and which limits its activities to the solicitation of orders for the sale of goods." Willis Report, at 145.

It is clear that P.L. 86-272 was enacted to address concerns of the business community with regard to their ability to sell products into states without having to bear unreasonable income tax burdens. Congress intended the Act to alleviate those concerns by allowing a minimum level of activity—that is, solicitation—to take place within a state without subjecting the business to such tax burdens. The only definition the term "solicitation" that does in fact address and alleviate the concerns of the business community is one that would allow all activities that en-

courage the placing of additional orders to be included within the Act's protection. This is the only interpretation that both recognizes the reality of the marketplace and how sales are in fact made and gives credence to the Congressional intent.

Senator Byrd commented on the Senate floor that

> all in the world [P.L. 86-272] would do is to say that *business which originates from the solicitation* of a traveling salesman, who does not have an office . . . is business which shall not be taxed, as interstate commerce, in regard to income taxes.

105 Cong. Rec. 16493-16494 (1959) (emphasis added). This language in the Congressional Record shows a clear understanding that solicitation is much more than marking off an order on an order form. Rather, all activities that encourage the placement of orders are part of the solicitation of orders.

It is this continuum of activity as part of solicitation that makes the pre-sale/post-sale test endorsed by a number of states completely unworkable. This test *simply does not* provide a clear line of demarcation or create certainty on behalf of taxpayers and taxing authorities as claimed by the State of Wisconsin and other states. Petitioner's Brief at 25; *Amicus* Brief of the State of Iowa et al. at 13. This test completely ignores the reality of making sales. As recognized by the Pennsylvania Supreme Court in *U.S. Tobacco Co. v. Commonwealth of Pennsylvania*, 478 Pa. 125, 139, 386 A.2d 471, 478 (1978), *cert. denied*, 439 U.S. 880 (1978):

> "[s]olicitation" does not stop at the moment a prospective customer (or wholesaler) is asked to consider purchasing the seller's goods: other practices incident to the initial contact between buyer and seller, such as advice on making the product attractive to the ultimate customer, also fall under the rubric of solicitation.

Most importantly, as stated above, sales solicitation takes place on a continuum. There is no clear line of demarcation between sales orders when ongoing business is solicited from a wholesaler or retailer. It is totally unreasonable and impractical to expect a salesperson, after getting one order and hoping to get additional orders, is asked for some kind of assistance regarding the goods in question, to either risk the additional business by refusing to give such assistance or to make a determination whether the request involves a pre-sale or post-sale activity. All acts of courtesy and goodwill are offered with the intent to induce a sale. One must keep in mind that

> [t]he essential purpose and design of Public Law 86-272 were to grant tax immunity to out-of-state vendors who are not "local merchants," but have salesmen in the State who solicit orders for acceptance out-of-state and shipment of the goods to the customers from other States. Activities such as checking inventory, assistance in display of a promotion, dealing with shipment delays, damaged merchandise, and the like typify the customary functions of sales representatives of out-of-state merchants. Whether they occur before or after particular solicitations ought not be relevant, since the activities do tend to encourage new orders.

J. Hellerstein, *State Taxation I: Corporate Income and Franchise Taxes* at 245 (1983). This Court stated in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 280 (1972) that "[c]larity that would remove uncertainty was Congress' primary goal" in passing P.L. 86-272. The pre-sale/post-sale test does not satisfy this goal. Further, this test fails to reflect the reality of doing business and the activities which are a necessary part of obtaining purchase orders, to wit, "soliciting orders".

The narrowest standard proposed must also be rejected out-of-hand as it would render P.L. 86-272 a nullity. This test, the "New Jersey/Arkansas" test, *Clairol, In-*

corporated v. Kingsley, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1972); *U.S. Tobacco Co. v. Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990), would consider all activities other than the strict taking of orders as being the protection of P.L. 86-272.

> Under the strict New Jersey approach, various "pre-sale activities" carried on by multistate firms . . . , including stocking product displays and taking inventory of retailers' stock, exceed the solicitation of orders because the multistate company is directly assisting local retailers in maintaining their in-state business operations.

Amicus Brief of the State of New Jersey, and the States of Alaska and Arkansas, at 5. Under this approach, "even those [activities] which may eventually lead to increased sales" are beyond the protection of P.L. 86-272. *Id.* at 2. The New Jersey/Arkansas test is so narrow and restrictive that it gives no effect to the enactment of P.L. 86-272.

In *Brown-Forman*, *supra*, the Louisiana Supreme Court upheld the imposition of an income tax on a nonresident corporation whose activities in the State were limited to the presence of "missionary men" who called upon wholesale dealers and, on occasion, accompanied the salesmen of the wholesaler to assist them in obtaining a suitable display of the corporation's merchandise at retailers' stores. The corporation's representatives did not solicit orders from retailers, but did apparently take orders from wholesalers for out-of-state approval. This Court allowed this decision to stand, as it did in *International Shoe*, *supra*. In that case, the company's sole activity within the state was the regular and systematic solicitation of orders by salesmen who carried shoe samples and were provided with company-owned automobiles. P.L. 86-272 was intended to alter the result in these two cases. Willis Report, *supra*. However, the narrow view advocated by the States of New Jersey, Arkansas and Alaska would

reach the same result as in the pre-P.L. 86-272 Louisiana cases. Under that approach, the activities as described would exceed the "solicitation of orders", even though the Act was intended to protect just such activities. Thus, under the New Jersey/Arkansas test, the states have disregarded Congress' exercise of its Constitutional authority to regulate interstate commerce through the enactment of P.L. 86-272.

The only interpretation of the statutory language "solicitation of orders" that will effectuate Congressional intent in enacting P.L. 86-272 and which reflects the way in which the sale of goods is accomplished is the interpretation adopted by the courts in Wisconsin, Pennsylvania, *U.S. Tobacco Co. v. Commonwealth*, *supra*, Indiana, *Indiana Department of Revenue v. Kimberly-Clark Corporation*, 275 Ind. 378, 416 N.E.2d 1264 (1981), New York, *Gillette Company v. State Tax Commission*, 45 N.Y.2d 846, 410 N.Y.S.2d 65, 283 N.E.2d 764 (1978), and Missouri, *CIBA Pharmaceutical Products, Inc. v. State Tax Commission*, 382 S.W.2d 645 (1964)—that is, an interpretation encompassing all activities encouraging the placement of new orders.

CONCLUSION

For the foregoing reasons, the Committee on State Taxation of the Council of State Chambers of Commerce respectfully requests that the decision of the Wisconsin Supreme Court be affirmed.

Respectfully submitted,

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